(i) every person entitled to a share in consequence of the death or bankruptcy of a member who, but for his death or bankruptcy, would be entitled to receive notice of the meeting; and
(ii) the auditor for the time being of the company.

Article 111(2) *specifically* prescribes that *no other person shall be entitled to receive notices of general meetings.*

It follows therefore that Ming Yueh does not come within the purview of the said art 111 either. According to s 148(1) of the Companies Act 1965, every member shall, notwithstanding any provision in the memorandum or articles, have a right to attend any general meeting of the company and to speak and vote on any resolution before the meeting: provided that the company's articles may provide that a member shall not be entitled to vote unless calls or other sums personally payable by him in respect of the shares in the company have been paid.

As Ming Yueh was not a member of the first defendant company at the material time, it was therefore not entitled to be issued with a notice of the annual general meeting. That being the case, its so called rights to attend and vote thereat at the meeting as claimed by Ming Yueh were not sustainable. It is imperative therefore that Ming Yueh had no legal status to injunct the first defendant company from attempting to convene the annual meeting when in actual fact the first defendant company was merely complying with the statutory duties imposed on it. Clearly the action to get the injunction on 10 May 1989 smacked of mala fide on the part of Ming Yueh.

Mr Wong, for Ming Yueh, argued strenuously that the court needed to go into the details of the issues involved. With respect, I think Mr Wong was addressing his mind in the wrong directions. In fact, the issue relating to its right to obtain the injunction relating to the adjourned general meeting, in my view, was simple and straight forward — was and is Ming Yueh a registered member of the first defendant company at the material time of the application? I had already answered the question and the consequences that followed as a result of my answer. I would agree with Mr Wong that the court should go into the details of the issues if Ming Yueh asked for injunctions in prayers (2) and (3) of encl (5) but Mr Wong did not do so. Ming Yueh may well succeed in obtaining injunctions as in prayers (2) and (3). Mr Wong further submitted that Ming Yueh would be without remedy if the injunction is set aside and quoted 'equity would not allow a wrong to be suffered without remedy'. With respect, I do not agree. If Ming Yueh is successful in getting a declaration that those shares as claimed by it belonged to it and the necessary orders are given for the retransfer and the registration of those shares in the first defendant company to it, then Ming Yueh is perfectly entitled, especially in view of the substantial shares it will have, to exercise all the attendant rights that a member of a company has. Where is the injustice? In my view injustice would be caused here by Ming Yueh trying to stop the first defendant company from complying with the laws and frustrating the management of the first defendant company and I should say, even to the extent of getting the first defendant to run foul of Bank Negara, and which may in fact have an irreparable damage to the first defendant company. Further Ming Yueh's interest, if any, may eventually be jeopardized also.

In the result I was satisfied that Ming Yueh, not being a registered member of the first defendant company, had no rights of a member for it to exercise. Further, it has no legal status, being a stranger, to injunct the attempt of the first defendant company to hold the annual general meeting. The injunction was, in the circumstances, set aside by me and I also ordered the senior assistant registrar to assess the damages. Costs to the first defendant company.

Injunction set aside.

Solicitors: *Siong & Wong Advocates; Robin Hii & Co Advocates; Ibrahim & Co Advocates; Reddi & Co Advocates.*

Reported by *Michele Rasanayagam*

Government of Malaysia v Sim Soe Hoe

HIGH COURT (SIBU) — SUIT NO 2 OF 1987
CHONG SIEW FAI J
26 AUGUST 1989

Civil Procedure — Regular judgment — Application to set aside — Recovery by government of taxes due and payable — Principles to be applied in civil proceedings brought by the government for taxes due and payable — Income Tax Act 1967, ss 103(1), (4), 106(1) & (3) — Rules of the High Court 1980, O 13 r 8

The defendant was served with six notices of assessment relating to income and development taxes. He failed to pay and the assessed taxes were increased by 10% and subsequently a further 5% under s 103(4) and (5) of the Income Tax Act 1967. The amount was still not paid and the plaintiff issued a writ and subsequently obtained a default judgment. The defendant applied to set aside the judgment, contending that he had a good defence on merits, on the grounds that some of the notices of assessment were incorrectly assessed and that the plaintiffs did not refer the matters to the special commissioners appointed under the Income Tax Act 1967.

Held, dismissing the defendant's application:

(1) Where applications are made to set aside default but regular judgments, the inflexible rule is that there ought to be an affidavit showing a defence on merits. If the application is not thus supported, it ought not to be granted except for some very sufficient reason. To show a defence on merits, a defendant need only disclose an arguable or triable issue.

(2) However, s 106 of the Income Tax Act 1967 provides that taxes due and payable may be recovered by the government by civil proceedings as a debt due to the government and in any such proceedings the court shall not entertain any plea that the amount of tax sought to be recovered is excessive or incorrectly

assessed. This principle would apply equally to applications under O 14 and O 13 r 18 of the Rules of the High Court 1980.

(3) The defendant's application therefore disclosed no triable or arguable issues and was dismissed with costs.

Cases referred to

1 *Evans* v *Bartlam* [1937] 2 All ER 646 (refd)
2 *Farden* v *Richter* (1889) 23 QBD 124 (refd)
3 *Government of Malaysia* v *Abdul Rahman* [1975] 1 MLJ 276 (follD)
4 *Chong Woo Yit* v *Government of Malaysia* [1989] 1 MLJ 473 (follD)

Legislation referred to

Income Tax Act 1967 ss 103(1), (4), (5A), 106(1), (3)
Rules of the High Court 1980 O 13 r 8

Wong Sing Nang for the applicant/defendant.
Vincent Josef (Assessment Officer of Inland Revenue Department) for the plaintiff/respondent.

Cur Adv Vult

Chong Siew Fai J: This is an application by the defendant to set aside the judgment in default of appearance obtained by the plaintiff on 17 March 1987. The following facts are not disputed: The defendant was served with six notices of assessment or additional assessment relating to income or development taxes for years of assessment 1975, 1978 (additional), 1983 (two notices), 1984 and 1985. The defendant failed to pay up, and the assessed taxes were increased by 10% and subsequently another 5% under sub-ss (4) and (5A) of s 103 of the Income Tax Act 1967 ('the Act') respectively. As the amount was not paid, the plaintiff took out the writ herein culminating with entry of the default judgment. The defendant now seeks to set aside the default judgment.

The taxes assessed and the increased sums imposed were, if unpaid, recoverable as if they were taxes due and payable under the Act. (See s 103(4) and (5A) of the Act.) It is not disputed that the judgment is a regular judgment.

In his affidavit made on 25 October 1988, the defendant explained why the default judgment was suffered to be entered. Briefly, it is that after receipt of the writ of summons, he had left the matter to his 'adviser and accountant' who failed to take the necessary steps to defend the action. The explanation, of course, is a factor to which the court will have regard, if and when considering whether discretion ought to be exercised to allow the application: *Evans* v *Bartlam*[1] at p 650.

For the defendant, it was contended that the defendant had a good defence on merits on the grounds that:

(1) put concisely, some of the taxes contained in some of the notices of assessment were incorrectly assessed, in that they were not gains or profits liable to tax under the Act;
(2) the plaintiff did not refer the matters to the special commissioners appointed under the said Act.

In normal cases, where applications are made to set aside default but regular judgments, the rule, which has sometimes been described as 'an almost inflexible rule', is that there ought to be affidavits stating facts showing a defence on the merits. Or, at any rate, where the application is not thus supported, it ought not to be granted except for some very sufficient reason: *Farden* v *Richter*.[2] And, to show a defence on the merits, a defendant need only disclose an arguable or triable issue.

In our instant case, the crucial question, however, is: Having regard to the relevant provisions in the Income Tax Act 1967 (to which provisions I shall refer) and in view of the nature of the claims in this action, does that normal rule of showing defence on the merits apply?

Section 103(1) of the Act makes the assessed tax due and payable at the place specified in the notice of assessment whether or not the person assessed appeals against the assessment. Under s 103(4) and (5A) of the Act, the assessed and increased taxes shall, upon the expiry of the periods therein specified, be recoverable as if they were taxes due and payable under the Act.

Section 106(1) of the Act provides that tax due and payable may be recovered by the government by civil proceedings as a debt due to the government, and sub-s (3) of s 106 enacts, inter alia, that in any proceedings under the section, the court shall not entertain any plea that the amount of tax sought to be recovered is excessive or incorrectly assessed or increased under s 103(4) or (5A).

In *Government of Malaysia* v *Abdul Rahman*,[3] the court, in dismissing the appeal against the grant of leave to sign final judgment under O 14, held that it could not entertain any plea that the tax or additional tax was incorrectly assessed. The dictum of the late Arulanandom J on that point was approved by the Supreme Court in the recent case of *Chong Woo Yit* v *Government of Malaysia*[4] of which I am bound. I would reproduce here the relevant part of the judgment by Gunn Chit Tuan SCJ (at p 475):

> We would agree and approve the following dictum of Arulanandom J (as he then was) in that case when he said:
>
> 'When proceedings are commenced under O 14 the normal rules for triable issues do not apply to cases of this nature because of the provisions of the Income Tax Act 1967. Normally when the defence raises triable issues it is a rule of law that unconditional leave to defend should be given but under s 106(3) of the Income Tax Act it clearly states that in any proceedings commenced by the government under s 106(1) of the Act for the recovery of tax by civil proceedings as a debt due to the government the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s 103(4) or (5). In this case the Director-General had exercised his powers under s 91(1) of the Act and made additional assessments and added penalties which were provided for by the Act. Since the amount was not paid within 30 days, further penalties were added and since that was not paid civil proceedings were brought to recover the tax as a debt due

to the government. Under s 103(1) regarding payment of tax, the section reads:

Subject to this section, tax payable under an assessment for a composite assessment shall on the service of the notice of assessment or composite assessment on the person assessed be due and payable at the place specified in that notice whether or not that person appeals against the assessment or composite assessment, as the case may be.

It is therefore quite clear that the Act does not contemplate any finality of assessment as it is clearly required in the Act that the moment the notice of assessment is served on the taxpayer the tax becomes payable whether the taxpayer appeals against the amount or not.'

We were satisfied that in this case there are no triable issues and therefore dismissed the taxpayer's appeal with costs.

Though *Chong Woo Yit*'s case[4] was on an O 14 application, the principle stated above, in my opinion, equally applies to an application for setting aside default judgment under O 13 r 8.

The supplementary affidavit of the defendant alluded to the real property gains tax though this was not dealt with by counsel for the defendant in his submission nor averred in the plaintiff's statement of claim. However, for the purpose of this application, I find the point raised in the supplementary affidavit immaterial and of no significance because, assuming that the Real Property Gains Tax Act 1976 applies, this Act contains similar or substantially similar provisions as those in s 103(1) and (4) and s 106(1) and (3) of the Income Tax Act 1967. (See s 21(1) and (4) and s 23(1) and (3) of the Real Property Gains Tax Act 1976.) The result remains the same, ie the court will not entertain any plea that the amount of tax sought to be recovered is excessive, or incorrectly assessed or increased.

As regards the second ground of the defendant that his disputes over the assessments were not referred to the special commissioners, counsel for the defendant conceded that the letters (exhs 'SSH 2', 'SSH 3' and 'SSH 4' annexed to the defendant's affidavit made on 25 October 1988) were given out of time, ie after the 30 days required under s 99(1) of the Income Tax Act (s 18(1) of the Real Property Gains Tax Act 1976). There is no evidence nor has it been submitted that extension of time for giving notice of appeal had been applied for and granted. Also, the letters dealt with taxes for years of assessment 1975 and 1978 only.

For the plaintiff, it is not clear whether the complaint of the defendant is pending appeal. In any event, by virtue of s 103(1) and (4) and s 106(1) and (3) of the Income Tax Act 1967, the taxes involved are due and payable and recoverable as a debt due to the government by civil proceedings in which the plea of excessive or incorrect assessment could not be entertained. (For the equivalent of these provisions in the Real Property Gains Tax Act 1976, see above).

For the above reasons, this application is dismissed with costs to the plaintiff. In the absence of an agreement, such costs may be taxed.

Application dismissed.

Solicitors: *Wong & Co.*

Reported by *Mathavan Devadas*

United Engineers (Malaysia) Bhd v Yeong Sinn Hoong

HIGH COURT (KUALA LUMPUR) — SUIT NO C1942 OF 1982
ZAKARIA YATIM J
27 JUNE 1989

Bailment — Breach — Loss of goods entrusted to bailee's care — Burden of proof — Contracts Act 1950, ss 104 & 105

Civil Procedure — Parties — Party to be sued — Whether sole proprietor or company to be made defendant

By an oral agreement between the plaintiff and the defendant, it was agreed that the plaintiff would from time to time deposit its goods at the defendant's warehouse. On 9 November 1981, the plaintiff delivered to the defendant 21 cases of Condor earth leakage circuit breakers ('the said goods') to be safely kept and taken care of by the defendant and to be returned to the plaintiff on demand. The said goods were delivered by the plaintiff's forwarding agent to the defendant with a delivery note. The defendant billed the plaintiff monthly for the storage of the said goods and the plaintiff paid the defendant on the due date. The plaintiff wrote two letters to the defendant informing the defendant that the plaintiff's goods must not be allowed to leave the defendant's warehouse without the authorized signature of either of the officers of the plaintiff. Their specimen signatures were contained in the letters. The plaintiff alleged that on 17 March 1982 the defendant, without the lawful authority of the plaintiff, unlawfully released 20 cases of the said goods from the defendant's custody to persons unknown. The said goods were released by the defendant to persons unknown on the basis of a letter purportedly written by the plaintiff on the plaintiff's letterhead.

The defendant said that when the said letter was received, the said goods were released. The plaintiff did not receive the said goods. The plaintiff thus commenced this suit, claiming from the defendant a sum of $116,680 together with interest and costs for the loss of 20 cases of the said goods.

Held, giving judgment to the plaintiff:

(1) On the issue of whether the sole proprietor or the company should be the party named as defendant, Syarikat Tropical Baggage was a sole proprietorship. The defendant was carrying on business in the name or style of Syarikat Tropical Baggage and thus the plaintiff could sue him in that name or style as if it were the name of the firm. It was proper for the plaintiff to sue the defendant in his own name and to add below his name within brackets (trading as, 't/a' Syarikat Tropical Baggage).

(2) Under ss 104 and 105 of the Contracts Act 1952, the loss of the said goods entrusted to the defendant is prima facie